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No.

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# IN THE
# SUPREME COURT of the UNITED STATES
## OCTOBER TERM, 1996

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**MICHAELINA ORTIZ,**
*Petitioner,*

vs.

**JOHN O. BUTLER COMPANY,**
*Respondent.*

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the District Court's entry of summary judgment for the Defendant on the basis of mootness, as there were triable issues of fact as to Defendant's liability, and the damages to be recovered by Plaintiff at trial, and with respect to Plainitff's entitlement to Punitive damages, the District Court, and in turn the Court of Appeals, had incorrectly applied an erroneous and overly narrow legal standard embodied in Illinois rather than Federal law, in contravention of Plaintiff's right to a jury trial on the merits pursuant to Title VII, to the facts of this case, thereby rendering moot by judicial fiat a live case and controversy.



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PETITION FOR WRIT OF CERTIORARI
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The Petitioner Michaelina Ortiz respectfully prays that a writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on September 9, 1996, affirming the Trial Court's grant of Summary Judgment to Defendant John O. Butler Company.

## OPINION BELOW

The Order and Opinion of the Court of Appeals appears in the appendix hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit, affirming the District Court's order entering Summary Judgment in Defendant's favor, dated July 6, 1996, was entered on the Ninth Day of September, 1996. The jurisdiction of this Court is invoked pursuant to Title VII of the Civil Rights of 1991, 42 U.S.C. Section 2000(e),et seq., and 28 U.S. C. 1291.The basis of the trial court's jurisdiction was under Title VII of the Civil Rights Act of 1991, 42 U.S.C., Section 2000(e), et seq., and 28 U.S.C. 1331.

## CONSTITUTIONAL PROVISIONS INVOLVED

The text of the Seventh Amendment to the Constitution of the United States appears in the appendix hereto.

## STATEMENT OF THE CASE

Plaintiff Micaelina Ortiz filed her complaint on February 23, 1993. The complaint alleged that Plaintiff had been wrongfully terminated by Defendant in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. Sections 621 et seq., and had been the victim of retaliatory discharge by Defendant, in violation of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. Section 2000(e), et seq. [Record on Appeal, Volume 1, number 1, hereafter, (R 1-1).

Defendant John O. Butler Company is a manufacturer and distributor of oral hygiene products, such as toothbrushes and dental floss.(R 2-18, p. 2)

Defendant employs approximately 500 people. (R 2-18, p. 3).

Plaintiff Micaelina Ortiz was employed by Defendant rom February 17, 1983 until her termination on April 6, 1992. (Id.) Ms. Ortiz was first hired as an assembler. (Id.) Thereafter she worked in various positions in Defendant's Production Department, until her transfer to the Molding Department in April 1990, where she worked as a first shift molding operator until her termination. (Id). Ms. Ortiz is a Mexican immigrant and a permanent resident of the United States, and is not a fluent English speaker. (R 1 22, p. 2) This makes her typical of the workers Defendant uses to staff its Molding Department, most of whom are Hispanic immigrants, who speak English with only marginal proficiency.(Id. , R 2-18, p. 39).The Molding Department is not unionized, and Defendant's management vigorously and successfully resisted efforts to organize a union.(R 1-23, p. 6,7).Ms. Ortiz alleged in her complaint that she was terminated for complaints she had made regarding the working conditions at Butler, and because of her age. (R 1-38, p. 2, R 23 p.1). Ms. Ortiz alleged that during the tenure of her employment by Defendant, she was sexually harrassed by Frank Williams, her immediate supervisor. (Id.) This harassment took the form of lewd or suggestive remarks which he made on a daily basis; these unwelcome comments were sometimes accompanied by Williams physically touching her on the back, buttocks or thigh as she bent over a molding machine(Id. at 3,R 1 23, p1).

Ms. Ortiz further alleged that while she did nothing to encourage this behavior, she responded to the behavior by trying to ignore it: since she was afraid to directly confront Williams because he was her superior, and she was therefore afraid to openly confront him and forcefully tell him to stop. (Id. at 2). Her lack of receptiveness to the advances led Williams to reassign Ortiz from her position as machine operator to that of material handler, which involved more difficult physical work.(Id.) Such a move was regarded by machine operators as undesirable.(Id.).

Ms. Ortiz also alleged that Earl Phillips, her group leader, would belittle, threaten, and intimidate workers by raising his voice, using foul language, making derogatory ethnic remarks, engaging in name calling, and by making threats.(Id.) At times, Phillips would respond to employee's complaints with ethnic slurs which insulted the worker's Mexican national origin.(Id at 3). Phillips's large size and loud voice made his threats and intimidation all the more frightening. (Id.).

On a number of occasions, Ortiz and other employees complained to Williams(Williams was Phillips' superior) about Philips' attitude toward the employees in the molding department.(Id). These complaints were without any apparent effect. (Id). Accordingly, the molding department employees agreed among themselves that Williams would not, or could not get Phillips to change his behavior.(Id.).

In addition to apparently ignoring the complaints about Phillips directed to Williams, both Williams and Phillips actively

discouraged employees from complaining to the personnel department. (Id. at 4). In fact, at one point Phillips told Ortiz that employees who complained too much to the personnel department would get fired.(Id.)

In October, 1991 the employees, led by Laura Kaminski, asked Williams and Phillips to organize a meeting between the molding shop employees and management, in order to discuss working conditions and air their grievances.(Id.) Williams delayed and equivocated. After the passage of some time he told the workers that the meeting would take place after Thanksgiving, only later to tell them that it would take place after Christmas. (Id.) This pattern of delay led the workers to believe that management would never hear the employee's grievances, so long as they relied on Williams or Phillips to arrange the meeting. (Id.)

In January of 1992 Ms. Ortiz was approached at work by Laura Kaminski and Juanita Soto. (Id.) They discussed how the working conditions at the molding department were becoming intolerable, as a result of Phillips abusive comments, and Williams' sexual harassment.(Id.) Kaminski and Soto suggested that someone should write a letter to the personnel department, describing the supervisors' behavior.(Id.). Kaminski and Soto told Ortiz that they were planning to write such a letter, and asked Ortiz if she would sign it. (Id.). Ortiz replied that although she though that the letter was a good idea, she was worried about losing her job, and afraid of Phillips reaction, making her reluctant to sign the letter, unless everyone in the

department were to sign it.(Id. at 4, 5). In the following weeks, a number of the employees of the molding department discussed the possibility of sending such a letter to the personnel department. (Id. at 5). The consensus reached by the employees was that while sending a letter to the personnel department was a good idea, no one wanted to take the risk of being fired for signing it.(Id.).

After their first conversation, Kaminski approached Ortiz and showed her a letter she and her husband had written. Kaminski told Ortiz that this was sent anonymously, because too many people were afraid of signing it. Kaminski asked Ortiz to write another letter, since in Kaminski's opinion, if two letters were sent, the problems in the molding department would be taken more seriously by management.(Id.).

Ortiz then got together with Juana Soto, Luis Mejia at the house of a former Butler employee, Theresa Perez, and listed all of their complaints about the working conditions in the molding department.(Id.) Ortiz actively participated in the discussion. At the conclusion of their meeting, Theresa Perez wrote a letter containing their complaints, and mailed it to the Butler company. (Id. at 5,6). This was the handwritten letter in issue in this case.(Id.). Ortiz had not asked anyone to sign this letter, nor did she relate to others what had been done.(Id. at 6).

Ms. Ortiz had hoped that upon receipt of the letters, the personnel department would make an investigation into the complaints, and carefully observe Williams and Phillips. Ortiz was certain that if such an investigation were made, the

personnel department would catch Williams and Phillips, and then discipline them.(Id.).The letters were received, and Butler's management decided that the company should conduct an audit of the Molding Department personnel to investigate the complaints made in the two letters. (R 1-38, p. 3). This audit consisted of Susan Bondy, Defendant's Director of Human Resources, conducting individual employee interviews, whereby the interviewer would ask questions about the employee's work environment. (Id.) During the course of Ms. Ortiz's first interview, Ms Ortiz stated that she had not heard anyone in management use foul language, or make sexual comments.(Id.) At a later interview, Ms. Ortiz denied that she was involved in the drafting of either of the two letters. (Id.) Further, during the course of the deposition taken in furtherance of the instant proceedings, Ms. Ortiz denied having taken part in the drafting of either letter.(Id.)

Kaminski told Ortiz that Phillips was extremely angry about the complaints contained in the letters, and that he had said that he knew Ortiz was behind them.(Id.). The fact that Phillips knew about the letters led Ortiz to believe that the personnel department and the molding department supervisors were on the same side, and that the employee's complaints would not be supported. (Id.) Accordingly, Ortiz believed that the interviews the personnel department was conducting were being made for the purpose of determining who wrote the letters, and not to investigate the complaints contained in the letters.(Id.)

At the time, Ortiz believed that she would be fired if it appreared that she was involved in the complaints, so that when she was interviewed on March 19, 1992 by Mr. Spangler and Ms. Bondy of the personnel department, Ortiz did not discuss with them her problems with Williams and Phillips.(Id. at 7).

Ortiz continued to deny her participation in writing the letter at the meeting in which she was notified of her suspension, because she believed that she would be fired if she admitted her role.(Id.). In addition, Ortiz was fearful of what Phillips would do to her if she admitted that she had complained against him.(Id.) Williams was present at the meeting regarding her suspension, and Ortiz therefore felt intimidated, and perceived Williams, Spangler and Bondy to be on the same side. She believed that the suspension was a trick to get her to admit that she was involved.That is why she demanded to know who had told them that she was spreading lies about the supervisors.(Id.)

In her affidavit, Ms. Ortiz stated that she did not then offer to tell Bondy and Spangler who wrote the letters, nor did she say, as Spangler asserted, that she thought that the second shift was out to get her.(Id.) At the March 25, 1992 meeting with Spangler and Bondy, Ms. Ortiz was confronted with the letters.(Id.) Bondy and Spangler told her that five people had told them that Ortiz wrote a letter.(Id.)Fearing that she would be fired, Ortiz denied her involvement in writing the letter.(Id. at 7, 8).

In her affidavit, Ms. Ortiz stated that she was confused during her April 6, 1992 termination meeting.(Id. at 8). Adding to her confusion was the fact that the personnel department employee assigned to translate for her was not doing a very god job, leading Ms. Ortiz to have trouble understanding what was being said.(Id.).

Throughout the course of the meeting Ortiz continued to believe that she would be fired for admitting her involvement in the letter writing, so she therefore continued tosteadfastly deny her participation.(Id.).After the audit was completed, Butler accused Ortiz of intentionally and maliciously creating and disseminating false claims of sexual harassment. (R 1-38, p. 4) Defendant had suspended all the employees it believed were involved in the alleged creation of the falsehoods, except for Ortiz, who was terminated on April 6, 1992. (Id.). Ortiz, who was forty four years old during the events in issue, claimed that the reason she was terminated, while other younger employees accused of the same conduct were merely suspended and demoted, was because of her age.(Id. )

**DEFENDANT'S FIRST MOTION FOR SUMMARY JUDGMENT**

On October 25, 1993 Defendant filed its first Motion for Summary Judgment.(R 1-11). In its motion Defendant argued that there was no material issue of fact as to Ms. Ortiz having established a prima facie case of retaliatory discharge, thereby entitling Defendant to Summary Judgment as to Count I. (Id. at 2). Defendant made a parallel argument that Ms. Ortiz had

failed to establish a prima facie case of age discrimination, thereby entitling Defendant to Summary Judgment as to Count II. (Id. at 2, 3).

In its Memorandum Opinion and Order of May 26, 1994 the Trial Court denied Defendant's Motion for Summary Judgment with respect to Count I of Plaintiff's complaint.(R 1-38). The Trial Court held that the evidence before it showed that Plaintiff had established a prima facie case of retaliatory discharge in violation of Title VII, in that 1) she engaged in statutorily protected opposition, 2) she suffered adverse action by Butler, and 3) that there was a causal link between Plaintiff's oppoisition and the adverse employment action. The court observed that in order for the plaintiff's expression to be statutorily protected, the practice challenged by Plaintiff need not actually violate Title VII, instead, it was sufficient that the plaintiff has a reasonable belief that she is challenging conduct violative of Title VII. (Id. at 6).

The Trial Court held that the evidence in this case showed that Ms. Ortiz was first suspended, and then later terminated, at least in part, because the defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors: Defendant's management had concluded that plaintiff was clearly involved in disseminating what they believed to be false claims regarding Williams and Phillips, based on the fact that so many other employees had identified plaintiff as someone who either had asked them to sign one of the letters describing the allegedly hostile work

environment at Butler, or who had written one of the letters.(Id. at 7).

The Trial Court found that as a result of this conclusion on the part of Defendant's management, Plaintiff was notified that she was suspended for one day and demoted to a job in the production department with less pay "for making false statements and accusations with malicious intent." The Court further found that Plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harrassment, and because of her purported failure to accept responsibility for her behavior. (Id.) The Trial Court further found that entry of summary judgment was not warranted because Plaintiff had established a prima facie case of retaliatory discharge, because Defendant admitted that it believed that Ortiz had complained of sexual harassment and acted on this belief when suspending and terminating her. (Id. at 7, 8). The Trial Court noted that the majority of courtscharged with interpreting Title VII have been willing to construe the applicable sections of Title VII broadly, in order not to frustrate the statute's purpose, which is to "prevent fear of economic retaliation from inducing employees 'quitely to accept[unlawful] conditions.'" (Id. at 9). The Trial Court accordingly found that the phrase in Section 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to

sexual harassment. (Id. at 10).

The Trial Court further found that Ortiz had presented evidence to the court, in the form of her affidavit and the affidavit of her co-worker, Marie Robles, that indicated that Ortiz's supervisors may have actually engaged in sexually harassing behavior, a genuine issue of fact existed as to whether Ortiz had intentionally and maliciously filed baseless charges of sexual harassment agains her supervisors(as Defendant had argued), it could not rule as a matter of law that Ortiz had failed to prove a prima facie case of retaliatory discharge.(Id. at 11).

The Trial Court also found that the reasons articulated by Defendant for Ortiz's discharge were not a pretext for age discrimination, and that Defendant was therefore entitled to a grant of summary judgement as to Ortiz's claim of age discrimination st forth in Count II of her Complaint (Id. 14).

**DEFENDANT'S MOTIONS FOR RECONSIDERATION**

Defendant moved on three separate occasions for the Trial Court to reconsider its denial of Defendant's Summary Judgment Motion.(R 1-40, 1-43). Defendant's first Motion for Reconsideration was premised on Defendant's contention that Defendant had demonstrated, as a matter of law, that Plaintiff had "intentionally and maliciously filed baseless charges against her supervisors." R 1-40. On June 10, 1994 the Trial Court entered its Order denying said Motion. In reaching its decision, the Trial Court held as follows:

> What defendant fails to recognize, however, is

> defendant's belief about plaintiff's charges may be different than the truth regarding these charges.Whether plaintiff in fact filed baseless charges is still in dispute in this case. . . .The court finds that a factual dispute exists regarding whether or not plaintiff intentionally and and maliciously filed baseless charges of sexual harassment against her supervisors, making summary judgment in favor of defendant onCount I inappropriate. Order, June 10, 1994, (R-141).

On February 14, 1995 Plaintiff's attorney presented his motion to withdraw as attorney of record for plaintiff; said Motion was denied on that date.(R 1-53). On March 7, 1995 the final pre-trial conference was held and the final pre-trial order was filed. (R 1-55, 56) .

**DEFENDANT'S SECOND MOTION FOR SUMMARY JUDGMENT**

On April 28, 1994 Defendant filed its second Motion for Summary Judgment.(R 2-63). In this motion Defendant maintained that it was entitled to a judgment as a matter of law, because based upon the uncontradicted facts of record in the cause, there were no issues of material fact as to the relief to which the plaintiff was entitled, since, according to Defendant, Plaintiff's own supplemental statement of damages incorporated into the Final Pretrial Order entered by the Court on March 7, 1994, showed that Plaintiff had received all the relief to which she could be entitled, and that accordingly Plaintiff's lawsuit sought no redressable injury, and no case or controversy existed, thereby rendering Plaintiff's claim

moot.(Id.).

The Trial Court granted Defendant's second motion for summary judgment.(R 2-13). In reaching its decision, the Trial Court stated that it had relied on Plaintiff's Supplemental Damage Statement to the Final Pretrial Order, which identified the following damages that Plaintiff was entitled to recover from Defendant: lost wages and benefits of $15,350.00, which was offset by a settlement of Plaintiff's NLRB claim, in the amount of $16,000, resulting in damages as and for lost wages and benefits in a negative amount -$649.60; increase in burden of proof" of $100,000; punitive damages in the amount of $300,000. The Trial Court also found that as a matter of law, Plaintiff was not entitled to Punitive damages.(R 2-13).Plaintiff filed her pro-se Notice of Appeal from the judgment entered by the Trial Court on August 1, 1995.(R 1-78). On September 9, 1996 the Court of Appeals affirmed the Trial Court's Judgment.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals erred in affirming the District Court's entry of summary judgment for the Defendant on the basis of mootness, as there were triable issues of fact as to Defendant's liability, and the damages to be recovered by Plaintiff at trial, and with respect to Plainitff's entitlement to Punitive damages, the District Court, and in turn the Court of Appeals, had incorrectly applied an erroneous legal standard embodied in Illinois rather than Federal law, in contravention of Title VII, to the facts of this case, thereby rendering moot by judicial fiat a live case and controversy.

Petitioner respectfully submits that the affirmance by the Court of Appeals of the Trial Court's determination that Plaintiff's case was moot and that under no circumstances would Plaintiff be able to go forward to the jury on her claim

for damages arising out of her employer's retaliatory conduct in violation of Title VII was in error, as the Trial Court had ignored those elements of compensatory damages which a Title VII claimant is entitled to seek as of right, and improperly based its determination that Plaintiff was not entitled to present to the jury her claim for punitive damages on an application of Illinois, rather than Federal case law, which served to deprive Plaintiff of her right to a trial by jury, as set forth by the statutory enactments governing Title VII, which extend to a claimant a right to a trial by jury, as guaranteed by the Seventh Amendment to the Constitution of the United States.

Title VII makes it unlawful "for an employer to discriminate against any of his employees or applicants for employment because he has opposed any practice made an unlawful employment practice by [Title VII]." McDonnell Douglas Corp. v. Green 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff need not succeed on her sexual harassment claim to make out a prima facie case of retaliatory discharge. Instead, it is sufficient if the plaintiff has a reasonable belief that she is challenging conduct that violates Title VII., as it is the employee's good faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a retaliation case. Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179, 1182 (7th Cir.1982).

The Trial Court made a specific finding in its denial of Defendant's First Motion for Summary Judgment, directed at Count I of the Complaint that the evidence in this case showed that Ms. Ortiz was first suspended, and then later terminated, at

least in part, because Defendant believed that she had intentionally and maliciously filed baseless charges against her supervisors. Defendant's management had concluded that plaintiff was clearly involved in disseminating what they believed to be false claims regarding Williams and Phillips.(Id. at 7).

The Trial Court found that as a result of this conclusion on the part of Defendant's management, Plaintiff was notified that she was suspended and demoted with less pay "for making false statements and accusations with malicious intent;" the Trial Court further found that Plaintiff was later terminated because of her refusal to admit that she had falsely accused Williams and Phillips of sexual harrassment, and because of her purported failure to accept responsibility for her behavior. (Id.)

The Trial Court found that even if Plaintiff did not write or disseminate the letters complaining about sexual harassment at Butler, Plaintiff was nevertheless still able to establish a prima facie case of retaliatory discharge, precisely because Defendant admitted that it believed that Ortiz had complained of sexual harassment and acted on this belief when suspending and terminating her. (Id. at 7, 8).

The Trial Court found that the phrase in Section 2000e-3(a), "because he has opposed any practice made an unlawful employment practice under this subchapter," should be broadly construed to include a claim based upon an action taken against an employee because of an employer's belief that the employee engaged in opposition to sexual harassment. (Id. at

10).The above findings are the law of the case with respect the liability issues.These findings were adopted by the Parties in their Joint Statement of Uncontested Facts contained in the Pre-Trial Order and should be seen as controlling with respect to the liability issues.( R 4-56): Joint Pretrial Order, Statement of Uncontested Facts, Paragraph 87, citing Memorandum Opinion and Order of Judge Holderman, dated May 26, 1994, pages 7, 13). These findings show that Plaintiff had a viable claim against her employer on the underlying issue of her employer's violation of Title VII.

The evidence of record presented adequate and sufficient evidence that Plaintiff was entitled to an award of compensatory and punitive damages, rendering her claim far from moot. Plaintiff respectfully submits that the Trial Court was therefore in error in granting summary judgment when viable triable issues of fact existed.

In granting Defendant's Second Summary Judgment Motion, the Trial Court determined that the record before it showed that there were no triable issues of fact, since Ortiz had no redressable injury, her claim was moot and therefore subject to dismissal.(R 2-73, p. 9). The Trial Court based its determination that there were no triable issues of fact relative to damages on Plaintiff's Supplemental Damage Statement to the Final Pretrial Order, which included lost wages and benefits of $15,350.00 increase in burden of proof" of $100,000; and punitive damages in the amount of $300,000.

The Trial Court focused on the above elements of damages,

in reaching its decision that no material issue of fact existed as to the damages that could be awarded to Ms. Ortiz. Yet the Trial Court apparently overlooked those elements of damages in a Title VII case which are available pursuant to statute, and therefore need not be specifically set forth in a Pretrial Order, and are accordingly not waived thereby, as well those elements of damages which were included in the original Damage Statement, which were later supplemented by Plaintiff's Supplemental Damage Statement, as well as those elements of damages which were set forth in Plaintiff's proposed jury instructions, which were appended to, and made a part of the Joint Pretrial Order.

It is well settled that a plaintiff is not required to itemize his damages claims in his complaint; to the contrary, Federal Rule 54(c) entitles him to a judgment that grants him the relief to which he is entitled even if the complaint failed to ask for that relief. Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, (C.A.7 (Ill.) 1995) Federal Rule of Civil Procedure 9(g) does require that the complaint plead "special damage," which consists of those damages that are unusual for the type of claim in question however,the governing statute entitles the plaintiff to recover damages for the full consequences of the discharge including emotional distress.

Plaintiff's initial Statement of Damages set forth the following elements of damages: lost wages(back and front pay), lost benefits, out-of pocket pecuniary losses, attorneys fees and court costs, and punitive damages, without setting forth any

specific dollar figure for said damages. (Final Pre-Trial Order, Exhibit N). In addition, Plaintiff's proposed jury instructions relative to damages did describe with particularity the compensatory damages available to Plaintiff under Title VII which were to be considered by the jury, including damages for emotional pain and suffering.(Final Pretrial Order, Exhibit S, Plaintiff's Jury Instruction 8) No reason exists why a claimant Under Title VII should be required to set forth any particularized listing of damages in a pretrial order, which is required when a party claims special damages as it should be sufficient,consistent with the rule in antitrust cases, that the plaintiff need only demonstrate a "just and reasonable estimate" of his damages. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 66 S.Ct. 574, 579, 90 L.Ed.

In its Opinion and Order affirming the Trial Court's Decision, the Court of Appeals has deemed that Plaintiff waived consideration of those elements of damages set forth above, as they had not been specifically discussed in Plaintiff's response to the Pre-Trial Order. Plaintiff submits that the waiver doctrine should not be extended to such an extent that it allows a reviewing court to ignore statutory provisions which would ordinarily be subject to judicial notice.

In its first Memorandum Opinion and Order, The Trial Court made a specific finding that Ortiz had presented evidence to the court, in the form of her affidavit and the affidavit of her co-worker, Marie Robles, that showed that Ortiz's supervisors may have actually engaged in sexually harassing behavior, and

therefore, a genuine issue of fact existed as to whether Ortiz had intentionally and maliciously filed baseless charges of sexual harassment against her supervisors(as Defendant had argued). The Trial Court therefore found that it could not rule as a matter of law that Ortiz had failed to prove a prima facie case of retaliatory discharge.(Id. at 11).Yet in considering the issue of punitive damages pursuant to Defendant's Second Summary Judgment Motion, the Trial Court reached a diametrically different result, although none of the salient facts had changed in the interim. In evaluating Defendant's claim that there was no issue of fact as to a possible award of punitive damages, the Trial Court concluded that in the instant case, Ms. Ortiz had failed to present any evidence that Butler terminated Ms. Ortiz's employment either with actual malice or with reckless indifference to the Plaintiff's rights. (Id.).

The Trial Court based these findings in turn on its conclusion that the management's audit had been conducted fairly, and that during the audit, the employees, including plaintiff, not only did not confirm the allegations of discrimination contained in the letters, but actually denied the allegations. (Id.)

This led the Trial Court to determine, as a matter of law that Plaintiff had presented no evidence indicating that Defendant's management efforts to investigate the allegations of sexual harassment were a sham, or that management had actual knowledge of any sexual harassment by personnel in the Molding Department.(Id. )Yet whatever management's state of

mind or subjective belief as to the veracity of the letters may have been, the evidence of record was that Plaintiff was discharged for engaging in protected conduct, and later refusing to confess and recant. Substantial and compelling evidence existed in the process that led to the writing of two anonymous letters that many of Defendant's employees, including Ms. Ortiz, had a well founded subjective belief that dissent or complaint within the workplace would be punished. Assuming, for the sake of argument, that Defendant had an actual belief that the letters were false, the Record before the Trial Court at the time it entered summary judgment showed that even if it were accepted that Defendant indeed had such an actual belief, this nevertheless did not remove from the realm of possible triable factual questions the following issues: 1) whether or not the supervisory personnel had engaged in prohibited sexual harassment; 2) whether or not Plaintiff has a good faith belief in the veracity of the allegations; 3) whether the audit conducted by management was a fair and impartial investigation of the misconduct set forth in the two anonymous letters, or whether said audit in actuality was conducted in order to identify, intimidate and to punish those individuals who had voiced opposition to management; 4)and ultimately, even if Defendant had a subjective belief in the falsity of the letters, whether Mrs. Ortiz's discharge was the result of retaliation for her having taken part in protected expression or conduct.

Clearly, the above issues, if resolved in Plaintiff's favor at trial could lead to the assessment of punitive damages against

Defendant.

Under the Trial Court's analysis, as set forth in its Second Memorandum Opinion and Order, the scope of protected conduct under Title VII is so narrow as to be rendered meaningless, since any articulation of a belief on the part of management that a particular accusation leveled by an employee against the company was untrue, baseless, or without merit, would by its very invocation serve to counter a Plaintiff's prima facie showing of retaliatory discharge, and thereby render a Plaintff's claim almost automatically subject to dismissal at the summary judgment stage.

The Trial Court found that Ortiz had presented no evidence indicating that Butler's discharge of her was for any reason other than for Butler's stated belief that she had intentionally filed baseless charges of sexual harassment against her supervisors, in order to get them fired.(Id.).

Yet the record reveals ample and sufficient evidence to the contrary: Plaintiff was given the opportunity to remain at Butler, so long as she admitted and recanted her alleged wrongdoing. Were the proferred reason indeed the actual reason for the discharge, then Ortiz would have been discharged on the spot, without being given an opportunity to "take responsibility."Viewed in light of the above facts, the Trial Court's specific finding that the record demonstrated that Defendant did not act with actual knowledge that it was violating any of the plaintiff's federally protected rights or with reckless disregard of these rights in terminating her employment

was in error, as was its conclusion that Ortiz was not entitled to punitive damages as a matter of law. (R-14, at 9).

In cases of intentional discrimination in employment, Section 42 USC 1981 (a) provides that the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of said section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C.A. Sec. 2000e].

Yet in this case the Trial Court was able to reach a result which rendered Plaintiff's claims "moot", based on its assesment that as as a "matter of law" Plaintiff was not entitled to punitive damages, by applying the wrong law, which embodied a narrower legal standard than that which actualy controlled. The Court stated that in a Title VII retaliatory discharge case, punitive damages "are only appropriate in an egregious case of intentional discrimination when the defendant engaged in the unlawful employment practice with actual malice, or with reckless indifference as to indicate a wanton disregard for the rights of others," (R-14, at 9), citing Jackson v. Bunge Corporation 40 F. 3d 239, 246 (7th Cir.), and Hudson v. Soft Sheen Products, 873 F. Supp. 132, 136 (N.D. Ill. 1995).

The Trial Court's analysis was founded upon standards set forth in employment discrimination cases involving diversity of citizenship, wherein the substantive law of the State of Illinois was applied, instead of federal common law. Jackson v.

Bunge Corporation 40 F. 3d 239, 246 (7th Cir.),Hiatt v. Rockwell International 26 F. 3d 761 (7th Cir. 1994). Illinois law requires a significantly higher level ofculpability, than does federal common law.Under Illinois law, an employer must demonstrate utter indifference to, or conscious disregard for the employee's rights and the law in order to warrant an assessment of punitive damages. Id. Yet this higher threshold evidentiary burden was not applicable to the facts of this case, since issues of damages under Title VII and Section 1981 are to be a determined by an application of federal common law of damages,which imposes uniformity when enforcing the Civil Rights Acts. Lenard v. Argento, 699 F.2d 874, 897 (7th Cir.1983).

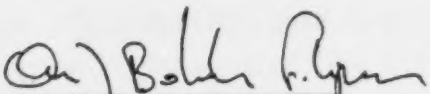
Under governing federal common law, it is well settled that a plaintiff who establishes a cause of action under Sec. 1981 may recover punitive damages under the proper circumstances. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460, 95 S.Ct. 1716, 1720, 44 L.Ed.2d 295 (1975). The Supreme Court in Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983), set forth the standard for punitive damages in a Sec. 1983 claim: "[A] jury may be permitted to assess punitive damages ... when the defendant's conduct is shown to be motivated by evil motive or intent, or it involves reckless or callous indifference to the federally protected rights of others." This is equally applicable to a suit brought under Sec. 1981. Yarbrough v. Tower Oldsmobile, Inc., 789 F.2d 508, (7th Circuit, 1986).

The Court of Appeals found that while the district court's articulation of the showing required for entitlement to punitive damages differed to some extent from the one contained in the statute, "the deviation is not significant." Slip Op. at 12.

Respectfully, this assessment was in error, because had the Trial Court applied the correct standard, the issue of punitive damages would have been for the jury to decide at the conclusion of trial, and not by the Trial Court on summary judgment.

The Trial Court's granting of the second summary judgment motion, when it is seen in the light of the same Trial Court's earlier denial of a very similar motion ,and in light of the fact that during the intervening period no new evidence had been adduced, was in error, since the same triable issues of fact were in existence during the pendency of both motions.. For this reason, as well as for the other reasons set forth above the Trial Court erred by granting Summary Judgment, and the Court of Appeals erred by affirming the Trial Court's decision.

Respectfully submitted,



Andrey Bohdan Filipowicz

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No. 95-2828

# IN THE
# UNITED STATES COURT OF APPEALS
# FOR THE SEVENTH CIRCUIT

| | | |
|---|---|---|
| **MICHAELINA ORTIZ**<br>*Plaintiff-Appellant,* | ) | |
| | ) | Appeal from the United States District Court, Northern District of Illinois, Eastern Division. No. 93 C 1123 James F. Holderman, Judge. |
| **v.** | ) | |
| **JOHN O. BUTLER COMPANY**<br>*Defendant-Appellee.* | ) | |

## ORDER

ARGUED APRIL 9, 1996--DECIDED SEPTEMBER 9, 1996

Before EASTERBROOK, RIPPLE, and KANNE, Circuit Judges.

KANNE, Circuit Judge. Micaelina Ortiz sued John O. Butler Company, alleging that Butler violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e et seq., by terminating her employment in retalia-

tion for her making complaints regarding what she alleges were hostile and discriminatory working conditions. The district court granted summary judgment in favor of Butler on the ground that Ortiz's claim was moot because, even if she prevailed, she would not be entitled to any damages. Ortiz appeals, and we affirm.

I.

Butler is a manufacturer and distributor of oral hygiene products. Ortiz was employed at Butler from February 17, 1982, until she was terminated on April 6, 1992.

In mid-March 1992, two anonymous letters were submitted to Butler's management complaining about the working conditions in the molding department. The letters made numerous accusations against the molding department supervisors, including allegations that the supervisors reprimanded the employees with obscenities, threatened employees with verbal and mental abuse, and sexually harassed employees. In response to the two letters, Butler management conducted an audit of the molding department personnel in order to investigate the complaints. The audit consisted of Susan Bondy, the director of human resources, and William Spangler, the director of operations, jointly conducting interviews of the molding department employees over a two-week period.

During the interviews, the audit team asked the employees questions about their work environment in general and whether they had any knowledge of any incidents of sexual harassment.

During the audit, the employees did not confirm the allegations of discrimination made in the two letters. While several employees complained about their supervisors' harsh language, each of the first-shift employees, including Ortiz, specifically denied that any of their supervisors ever had discriminated against them or made comments of a sexual nature to them or to others.

In addition, during their audit interviews several employees identified Ortiz as having written one of the two anonymous letters, having asked them to sign a letter, or having asked them to lie about incidents of sexual harassment during the audit interviews so that their supervisors would be fired. In order to investigate these accusations, Bondy and Spangler conducted a follow-up interview with Ortiz. In the second interview, Ortiz denied that she was involved in the drafting of either of the two letters complaining about the working conditions at Butler and denied that she solicited anyone to sign either letter.

After the audit was completed, Butler accused Ortiz and others of intentionally and maliciously creating and disseminating false claims of sexual harassment in order to discredit their supervisors and get them fired. Butler suspended all the employees, including Ortiz, believed to be

involved in the alleged creation of the falsehoods. At individual meetings these employees were advised of their one-day suspension and were asked to reflect upon their conduct and to decide whether they were committed to Butler or whether they wished to resign and receive severance pay.

After the suspension period, Bondy and Spangler again met privately with each of the three employees who had served their suspensions. The two other employees admitted their involvement in the letter-writing scheme, but Ortiz denied that she had done anything. Ortiz was then informed that because of her unwillingness to accept any responsibility for her conduct relating to the letters and her inability to get along with her coemployees, which had been a documented and continuing problem, her employment at Butler was terminated. Ortiz's termination was the subject of an NLRB claim, upon which Ortiz and Butler reached a settlement.

Ortiz subsequently sued Butler under Title VII, alleging that Butler unlawfully discharged her in retaliation for her exercise of her protected rights, admitting that she had, in fact, participated in writing the second letter. In her supplemental damage statement to the final pretrial order, Ortiz identified three categories of damages to which she was entitled: (1) lost wages and benefits in the amount of $15,350.40, less the settlement of the NLRB claim for the same lost wages and benefits in the amount

of $16,000, resulting in total lost wages and benefits of negative $649.60; (2) "increased burden of proof" damages in the amount of $100,000;/1 and (3) punitive damages in the amount of $300,000.

Butler moved for summary judgment on the ground that, even if she had made out a prima facie case for liability,/2 Ortiz's claim was moot because she could not recover any damages. The district court agreed, finding that Ortiz has not identified any damages she could recover if she were to prevail. The district court found that (1) Ortiz was not entitled to any compensatory damages because those claimed were offset by the NLRB settlement, (2) the "increased burden of proof" damages were not recoverable in a Title VII action, and (3) Ortiz had presented no evidence that would entitle her to punitive damages.

After the district court's grant of summary judgment, Ortiz filed a pro se notice of appeal. The notice names her as the appealing party, notes that Judge Holderman was the presiding judge, and sets forth the appropriate case number. The notice does not specifically state that Ortiz is appealing from the grant of summary judgment on mootness grounds, nor does it state the court to which Ortiz is appealing.

II

A.

In reviewing a district court's grant of summary judgment, we assess the record de novo and reach our own conclusions regarding law and fact. Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179, 181 (7th Cir. 1995). We will not resolve factual disputes or weigh conflicting evidence. We will only determine whether a genuine issue of material fact exists for trial, which is the case where "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). In reaching a conclusion as to the presence of a genuine issue of material fact, we must view the evidence and draw all inferences in a way most favorable to the nonmoving party. Tolentino v. Friedman, 46 F.3d 645, 649 (7th Cir.), cert. denied, 115 S. Ct. 2613 (1995). Where there is no genuine issue of material fact, the sole question is whether the moving party is entitled to judgment as a matter of law. If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party. Richards v. Combined Ins. Co. of America, 55 F.3d 247, 251 (7th Cir. 1995).

B

Before addressing the merits of this appeal, we must consider the argument raised by Butler that we lack jurisdiction over this appeal because Ortiz's notice of appeal fails to comply with the requirements of FED. R. APP. P. 3(c).

Rule 3(c) provides:

A notice of appeal must specify the party or parties taking the appeal by naming each appellant . . . . A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. FED. R. APP. P. 3(c).

The Supreme Court has held that the requirements of Rule 3(c) are jurisdictional and "their satisfaction is a prerequisite to appellate review." Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 682 (1992); Torres v. Oakland Scavenger Co., 487 U.S. 312, 317, 108 S. Ct. 2405, 2409 (1988). Nevertheless, "mere technicalities" should not stand in the way of our consideration of the merits, and we will find a notice of appeal sufficient so long as it "is the functional equivalent of what the rule requires." Torres, 487 U.S. at 316-17, 108 S. Ct. at 2408-09.

We first consider the impact of Ortiz's failure to specifically state in the notice of appeal that she is appealing from the grant of the motion for summary judgment on mootness grounds. "[A]n error designating the judgment or a part thereof will not result in a loss of appeal if the intent to appeal from the judgment complained of may be inferred from the notice and if the appellee has not been misled by the defect." Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 625 (7th Cir. 1993) (quoting Cardoza v. Commodity Futures Trading Comm'n, 768 F.2d 1542, 1546 (7th Cir. 1985)). Although the notice does not specifically designate that Ortiz was appealing from the summary judgment on mootness grounds, such an inference is readily drawn from the text of the notice, which includes the statement that Ortiz "COMPLAINS THAT SHE HAS [A] PROBABILITY OF A TANGIBLE BENEFIT FROM WINNING THE SUIT." Because we cannot see how Butler was misled by the defect, we find that the notice of appeal was sufficient with respect to this element.

We next consider the fact that the notice of appeal failed to designate the court to which Ortiz was appealing. Although designation of the court to which the appeal is taken is a mandatory requirement under Rule 3(c), the defect is not fatal where the intention to appeal to a certain court may be inferred from the notice and the defect has not misled the appellee. See United States v.

Musa, 946 F.2d 1297, 1301 (7th Cir. 1991); see also Anderson v. District of Columbia, 72 F.3d 166, 168 (D.C. Cir. 1995); McLemore v. Landry, 898 F.2d 996, 999 (5th Cir.), cert. denied, 498 U.S. 966 (1990). It is sufficient for our purposes that Ortiz's intent to appeal to this court is evidenced by the fact that, except in circumstances not applicable to this case, this is the only court to which Ortiz could have appealed. Musa, 946 F.2d at 1301; see also Anderson, 72 F.3d at 168; McLemore, 898 F.2d at 999. Again, Butler has not shown that it was misled by the failure to make an explicit designation. Therefore, we may exercise jurisdiction over this appeal.

III

A federal court's subject matter jurisdiction extends only to actual cases and controversies. Powell v. McCormack, 395 U.S. 486, 496 n.7, 89 S. Ct. 1944, 1950 n.7 (1969). A plaintiff seeking redress in a federal court must show "(1) an actual or threatened injury; (2) an injury that is 'fairly traceable' to the conduct; and (3) an injury that is likely to be redressed by a favorable decision." Jorman v. Veterans Admin., 830 F.2d 1420, 1424 (7th Cir. 1987). An injury is no longer redressable where "the parties lack a legally cognizable interest in the outcome." Powell, 395 U.S. at 496, 89 S. Ct. at 1951. Thus, where a plaintiff has received all of the requested relief to which she is legally entitled, there is no longer the requisite case or

controversy, and the court is without jurisdiction. See Cox v. Phelps Dodge Corp., 43 F.3d 1345, 1348 (10th Cir. 1994); Harrison v. United Mine Workers of America, 941 F.2d 1190, 1193 (11th Cir. 1991).

The district court granted summary judgment in favor of Butler because it concluded that Ortiz had already received the compensatory damages she had requested and that the "increased burden of proof" damages and punitive damages were not available to her as a matter of law. Ortiz has affirmatively abandoned her contention that she was entitled to the "increased burden of proof" damages. Thus, the only remaining questions are whether she was potentially entitled to any additional compensatory damages or to any punitive damages.

Ortiz raises several arguments for the proposition that she was entitled to compensatory damages over and above the lost wages and benefits that were offset by the NLRB settlement. However, Butler argues, and our review of the record confirms, that Ortiz raised these arguments for the first time on appeal. Ortiz has waived these arguments by failing to raise them before the district court, and we will not consider their relative merit. Pozzie v. U.S. Dept. of Housing & Urban Dev., 48 F.3d 1026, 1030 n.1 (7th Cir. 1995).

Ortiz raises two arguments challenging the district court's conclusion that she was not entitled to punitive damages. First, she argues that the district court applied an incorrect standard for determining when employers may be liable for punitive damages under Title VII. Second, she argues that there was a genuine issue of material fact as to whether she was entitled to punitive damages.

Citing to Hudson v. Soft Sheen Products, Inc., 873 F. Supp. 132, 136 (N.D. Ill. 1995), which discussed the legislative history of the Civil Rights Act of 1991, and Jackson v. Bunge Corp., 40 F.3d 239, 246 (7th Cir. 1994), the district court stated its conception of what a plaintiff must show to be entitled to punitive damages:

> Although punitive damages may properly be awarded in Title VII retaliatory discharge cases, they are only appropriate in an egregious case of intentional discrimination when the defendant engaged in the unlawful employment practice with actual malice, or with reckless indifference as to indicate a wanton disregard for the rights of others.

Ortiz argues that the district court erred by actually articulating the Illinois standard for punitive damages, which is what we applied in Jackson, a diversity case. As we recently noted, whether punitive damages are available in a Title VII case is a question of federal law and does

not concern the availability of punitive damages at state law. Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1352 (7th Cir. 1995).

The statute itself prescribes the proper standard for awarding punitive damages:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.42 U.S.C. sec. 1981a(b)(1).

Although the district court's articulation of the showing required for entitlement to punitive damages differs to some extent from the one contained in the statute (42 U.S.C. sec. 1981a(a)(2) sets forth the requirement that the discrimination be intentional), the deviation is not significant. In any event, Ortiz remains unable to show that there is a genuine issue of material fact that she would be entitled to punitive damages.

The district court concluded that Ortiz had failed to present any evidence that Butler terminated her employment with malice or reckless indifference to her protected rights, and we agree. Among the uncontested facts is the following statement concerning Butler's reason for ter-



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minating her: "Plaintiff was first suspended and later discharged because Defendant believed that Plaintiff had intentionally and maliciously filed baseless charges against her supervisors and Plaintiff refused to admit that she had falsely accused her supervisors of sexual harassment."

Ortiz argues that even though Butler fired her because it believed she had intentionally asserted baseless charges that does not mean the charges were, in fact, baseless and Butler's belief that the charges were baseless should not be sufficient to rebut a prima facie case of retaliatory discharge. Ortiz's arguments relate to Butler's liability in the first instance, which is distinct from Butler's liability for punitive damages. The requisite showing for punitive damages necessarily focuses upon the defendant's state of mind to discern the presence of malice or reckless indifference to the plaintiff's protected rights. And the evidence as to Butler's intent can only support the inference that Butler fired her because it sincerely believed she had intentionally asserted baseless charges.

Ortiz has also presented no evidence that impugns the fairness of the audit that Butler conducted to investigate the charges in the letters. Ortiz argues in her brief, without any citation to the record, that there is evidence that the audit was not conducted anonymously and that several employees were intimidated by the audit process. Ortiz also offers considerable speculation concerning a number of "possible triable factual questions." Speculation is in-



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sufficient to withstand summary judgment; the nonmoving party "must do more than simply show there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). And even if we could locate Ortiz's evidence, it is insufficient to raise a genuine issue of material fact that Butler terminated her with malice or reckless indifference to her federally protected rights.

For the foregoing reasons, the judgment is AFFIRMED.

FOOTNOTES

/1 Ortiz slipped and fell on Butler's premises eight months after she was terminated. Ortiz reasoned that had she remained employed at Butler she would have been able to file a worker's compensation claim, which has a lesser burden of proof than the common law negligence action that she actually filed. She valued the harm occasioned by this "increased burden of proof" at $100,000.

/2 The district court denied a previous Butler motion for summary judgment in which Butler had argued that Ortiz had failed to make out a prima facie case. In its memorandum opinion and order denying that motion, the district court held that Ortiz had, in fact, made out a prima facie case of retaliatory discharge and that "a reasonable fact finder could conclude that plaintiff reasonably believed that she challenged conduct which violated Title VII and that she was terminated for her opposition."

## Statute Involved

**Title VII of the Civil Rights Act of 1964**

**42 U.S.C. sec. 2000 e et seq.**